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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-991

Supreme Court U.S.
FILED
FEB 18 1978
MICHAEL RODAK, JR., CLERK

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Appellant,

vs.

GRACE AZNAVORIAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The United States District Court for the Southern District of California entered its judgment on September 6, 1977, (incorporating its Order of August 23, 1977) certifying this suit as a nationwide class action, declaring unconstitutional Section 1611(f) of the Social Security Act (42 U.S.C. §1382(f)), and granting certain class relief. The opinion and order of the District Court are officially reported at 440 F.Supp. 788 (S.D. Cal. 1977).

On September 22, 1977, the Secretary of Health, Education and Welfare appealed to this Court under 28 U.S.C. § 1252 from parts of the judgment adverse to him. Califano v. Aznavorian, No. 77-991. Appellant filed his Jurisdictional Statement on January 10, 1978.

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Appellees.

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DECLARATION IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, GRACE AZNAVORIAN, in support of my motion for leave to proceed on appeal in forma pauperis, declare:

1. I am the class representative appellee in the above-entitled case.

2. I currently receive Supplemental Security Income (SSI) (42 U.S.C. § 1382 et seq.) because of my disability and financial need. Because of my poverty I am unable to prepay any costs and fees in this appeal or give security therefor, and still be able to provide myself with the necessities of life.

3. On the basis of my attorneys' advice, I believe

Appellees are Grace Aznavorian, the class representative, and those class members granted relief by the District Court. Appellees, by their attorneys, respectfully move this Court for an order permitting them to proceed in this Court in forma pauperis, without prepayment of fees and costs or security therefor, pursuant to 28 U.S.C. §1915 and Supreme Court Rule 53. The Declaration of Grace Aznavorian is attached hereto. Appellees' Motion To Affirm Judgment is being filed with this motion.

Respectfully submitted,

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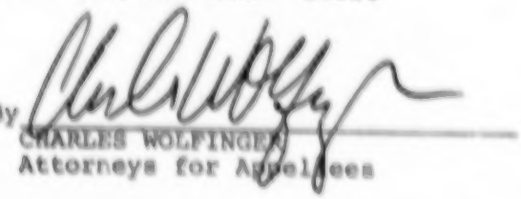
Dated: February 1978

By 
CHARLES WOLFINGER
Attorneys for Appellees

that the appellees I represent are entitled to the redress granted by the District Court. Aznavorian v. Califano, 440 F.Supp. 788 (S.D. Cal. 1977).

4. The nature of the relief granted is briefly stated as follows: Appellant, Secretary of Health, Education and Welfare, denied SSI to appellees under 42 U.S.C. § 1382(f) and 20 C.F.R. § 416.1327 solely because they travelled outside the United States for more than one month. Appellees filed timely claims for judicial review of said denials pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). The district court certified this case as a class action on behalf of appellees and all others denied SSI under Section 1383(f) between September 25, 1975 and August 23, 1977 (440 F.Supp at 792-94); ruled Section 1382(f) and 20 C.F.R. § 416.1327 unconstitutional (Id. at 795-800); and granted class relief in the form of administrative redeterminations of their eligibility. (Id. at 802, 805.)

Appellees' Motion To Affirm Judgment filed herewith contains a full description of all the reasons supporting that motion and the relief granted by the District Court.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on 2-8-, 1978.

Grace Aznavorian
GRACE AZNAVORIAN

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MOTION TO AFFIRM JUDGMENT

Appellees move, pursuant to Rule 16 of the Rules of this Court, for the affirmance of that part of the Judgment of the United States District Court for the Southern District of California entered on September 6, 1977, which is on appeal here.[1/] That Judgment declared Section 1611(f) of the Social Security Act, (42 U.S.C. §1382(f)), which suspends Supplemental Security Income (SSI) benefits to persons who travel abroad for more than one calendar month, to be violative of the equal protection guarantees in the Due Process Clause of the Fifth Amend-

1/ Plaintiffs have appealed part of the Judgment denying certain class members relief in Aznavorian v. Califano, No. 77-5999.

ment. This motion is made on the grounds that the district court's Opinion, Order,[2] and Judgment conform to prior decisions of this Court and, therefore, Appellant's Jurisdictional Statement ("Jur. St.") does not present issues which are worthy of plenary consideration by this Court.

INTRODUCTION

Section 1382(f) [3] creates a "conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." (440 F.Supp. at 795.) The section further precludes an applicant or recipient from reestablishing residency until he has been back in the United States for 30 consecutive days following a trip outside of the United States for 30 consecutive days. [4]

In the district court, plaintiff Aznavorian, a citizen and resident of the United States and an eligible recipient of Supplemental Security Income, challenged the constitutionality of Section 1382(f). She had travelled abroad for health reasons, not intending to remain outside of the United States for more than one month. (440 F.Supp. at 791.) However, she became ill and was unable to return to the Untied States until she had been outside the country for ten days more than one month. (Id.) Applying Section 1382(f) to her, the Secretary terminated her assistance for two full months. After exhausting her administrative remedies, Mrs. Aznavorian claimed in the district court that Section 1382(f) violated her due process and equal protection rights because it penalized her right of international travel in violation of the Fifth Amendment to

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2/ The Opinion and Order of the district court are now officially reported at 440 F.Supp. 788 (S.D. Cal. 1977).

3/ The full text of Section 1382(f) appears at 440 F.Supp. at 791.

4/ The Secretary mischaracterizes the invalidated section, stating that it "establishes an eligibility test for persons who leave the country for an extended period of time...(Jur. St. at 4-5.)

the United States Constitution. (Id.) She sought class certification, a declaratory judgment that Section 1382(f) was unconstitutional, and reversals of the Secretary's suspensions of SSI pursuant to Section 1382(f) of all class members and administrative rederminations of their residency according to proper constitutional standards. (440 F.Supp. at 791, 800-801.)[5]

On August 12, 1977, the district court issued its Opinion certifying a nationwide class of individuals denied SSI solely pursuant to Section 1382(f), declared Section 1382(f) unconstitutional under the Fifth Amendment, and granted class relief to appellee class members while denying it to appellant class members in Aznavorian v. Califano, No. 77-5999. (440 F.Supp. at 791-800.) The court issued its Order on the Opinion on August 23, 1977, (440 F.Supp. at 804-806) and its Judgment on September 6, 1977. (Jur. St. at 41A.)

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5/ Although appellees initially sought injunctive relief and the convening of a three-judge court in their complaint, they and the Secretary stipulated on November 5, 1976 that "plaintiffs...abandon[ed] all requests heretofore entered to enjoin defendant from enforcing 42 U.S.C. § 1382(f)."

ARGUMENT

I

42 U.S.C. §1382(f) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Historical Recognition of the Right to Foreign Travel

The right to foreign travel was recognized in the Magna Carta as early as the year 1215. See W. Swindler, Magna Carta - Legal and Legacy, 321-324 (1965). This right was recognized in the common law by the early seventeenth century. Parker, The Right to Go Abroad: To Have and to Hold a Passport, 40 VA. L.REV. 853, 868 (1954); Note, Passports and Freedom to Travel: The Conflict of a Right and a Privilege, 41 GEO. L.J. 63, 70 (1952). As noted repeatedly by this Court, "[t]he language of the constitution and of many acts of Congress could not be understood without reference to common law." Moore v. United States, 91 U.S. 270, 274 (1875); Schick v. United States, 195 U.S. 65, 69 (1904). And, "Blackstones Commentaries are accepted as the most satisfactory exposition" of the common law of England. Schick v. United States, supra, 195 U.S. at 69. Blackstone treated freedom of movement as a "personal liberty" that could not be restrained "unless by due course of law." W. Blackstone, Commentaries at 134.

The early American colonies recognized and protected the right to freedom of movement within and without national boundaries. See Chafee, Three Human Rights in the Constitution of 1787 at 171-181, 187 et seq. (1956).

B. Constitutional Standards For Measuring Infringements On The Right To Foreign Travel

While the Constitution contains no express grant of freedom to intrastate, interstate or foreign travel, this Court has stated:

> Undoubtedly the right of locomotion, the right to remove from one place to another according

> to inclination, is an attribute of personal liberty... Williams v. Fears, 179 U.S. 270, at 274 (1900).

See also Crandall v. Nevada, 6 Wall. 35, 44 (1868); Hague v. C.I.O., 307 U.S. 496 (1939); Edwards v. California, 314 U.S. 160, 177 (1941).

On three occasions this Court has decided foreign travel cases without specific reference to a rigid two-tier formula distinguishing between "strict scrutiny" and a "rational basis" review. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Zemel v. Rusk, 381 U.S. 1 (1965). However, an analysis of these decisions leaves no doubt that in each instance the Court invoked a heightened scrutiny virtually identical to that employed in more recent interstate travel cases. See Shapiro v. Thompson, 394 U.S. 618, 630-631 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974).

In Kent v. Dulles, supra, this Court for the first time dealt with the scope of protection afforded the right to travel abroad by the Fifth Amendment. The Government in Kent conceded that the right to travel abroad is a fundamental constitutional right to be equated with the right to travel from state to state and hence can be abridged only in conformity with the Fifth Amendment. (Brief for Respondent at 26-27.) It argued then, as it does here (Jur. St. at 8), that it could place any "reasonable restrictions" upon the foreign travel of its citizens. (Brief for Respondent at 67-69.)

Although the Court in Kent found that "[w]e need not decide the extent to which [the right to travel abroad] can be curtailed", it defined the right as "an important aspect of the citizen's 'liberty'" guaranteed in the Due Process Clause of the Fifth Amendment (357 U.S. at 127), and stated:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment ... Freedom of movement across frontiers

> in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country ..., may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. (357 U.S. at 125-126.) 6/

In reversing the passport restrictions in Kent, the Court noted that where foreign travel is involved, it will "construe narrowly all delegated powers that curtail or dilute" the right. (357 U.S. at 129.)

Six years later, Aptheker v. Secretary of State, supra, presented "the first [case] in which this Court has been called upon to consider the constitutionality of ... restrictions ... on the right to travel [abroad]." The Government again argued, as it does here, that the right could be curtailed by "regulation which is reasonably in relation to its subject" and that "reasonable regulation" could be constitutionally imposed. (Brief for Appellee at 12-13.) Its assertion, which undervalues the right under examination, was emphatically rejected by this Court:

> Although previous cases have not involved the constitutionality of statutory restrictions upon the right to travel abroad, there are well-established principles by which to test whether the restrictions here imposed are consistent with liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle ... that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". * * * *
>
> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light

6/ The Kent decision made no distinction between interstate and foreign travel, and relied upon Crandall v. State of Nevada, supra, Williams v. Fears, supra, and Edwards v. California, supra, involving travel within the United States. (357 U.S. at 126.)

> of less drastic means for achieving the same basic purpose." Aptheker v. Secretary of State, supra, 378 U.S. at 508.

The Court in Aptheker therefore completely and unequivocally rejected the Government's claims, virtually identical to those made in this case, that the restrictions on Herbert Aptheker's freedom of travel need only be constitutionally measured by a "reasonable" test. While in Aptheker the purpose for limiting travel concerned national security, the Court nevertheless found that "less drastic" means were available for "achieving the congressional objective" sought in the challenged statute. (378 U.S. at 512-512.) The Court further found that the limitation was not "narrowly drawn to prevent the supposed evil" and that "precision must be the touchstone of legislation so affecting basic freedoms." (378 U.S. at 514.)

The Court in Aptheker, finding that the "freedom of travel is a constitutional liberty closely related to rights of free speech and association" (378 U.S. at 517)(emphasis added), cited Shelton v. Tucker, 364 U.S. 479, 488 (1960) and NAACP v. Button, 371 U.S. 328, 438 (1963), in establishing that the methods employed to achieve the government purpose were impermissible because "less drastic means" were available. (378 U.S. at 508.) Contrary to the Secretary's assertions on the difference between the rights of interstate and international travel (Jur. St. at 8-9), an analysis of Shapiro and Maricopa County shows that they rely on the same standards enunciated in Shelton and Button as were relied upon in Aptheker. Both Shapiro and Maricopa County, citing Shelton and Button, invalidated durational residency requirements as infringing on the right to travel because "less drastic means [were] available" to achieve the government interest. (394 U.S. at 636-

37; 415 U.S. at 267.) 7/

Zemel v. Rusk, supra, is the most recent international travel case to be decided by this Court, and the only one the Secretary is willing to acknowledge. (Jur. St. at 9; Defendant's Motion for Dismissal and Summary Judgment at 18.) But even Zemel mandates constitutional standards far more stringent that the "rational basis" test urged by the Secretary. (Jur. St. at 8.) The Court devoted much of its analysis in Zemel to an examination of the "extent of the necessity for the restriction on travel." (381 U.S. at 10-17.) It was concluded that the "weightiest considerations of national security" supported the challenged restriction and that travel to Cuba may have involved "dangerous international incidents..." (381 U.S. at 15.) This Court was clearly looking for, and found, a government interest having more than just some "rational basis".

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7/ Recognizing this analysis, many courts have cited Aptheker as standing for application of the "compelling state interest" test. See, e.g., Cook v. Hudson, 511 F.2d 744, 751 (5th Cir. 1975) (J. Clark, dissenting); Baird v. Lynch, 390 F.Supp. 740, 749 (W.D. Wis. 1974) (three-judge court); Meek v. Pittenger, 374 F.Supp. 639, 652-653 (E.D. Pa. 1974), modified other gds. 421 U.S. 349 (1975); Flint v. Mullen, 372 F.Supp. 213, 217 (D. R.I. 1973), rev'd other gds. 499 F.2d 100 (1st Cir. 1974); Krzewinski v. Kugler, 338 F.Supp. 492, 498 (D. N.J. 1972).

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In Zemel, as in other decisions of this Court and of the lower courts, 8/ no clear distinctions are manifested between internal and external travel.

While limitations on the right to travel may often involve concurrent limitations on the rights of associations, speech and the "free flow of information" (Zemel v. Rusk, supra, 381 U.S. at 16), this Court has held that these incidental restrictions do not turn the right to travel into a First Amendment right. (381 U.S. at 16-17.) The Court has therefore specifically rejected the notion that the constitutional standards enunciated in Zemel were applied because of First Amendment rights allegedly present in that case: "we cannot accept the contention that it is a First Amendment right which is involved." (381 U.S. at 16.) The standards enunciated in Kent, Aptheker and Zemel were not arrived at because of the incidental First Amendment issue present in those cases, but rather because the

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8/ See note 7 supra; Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (noting the right to travel is a "basic right" and citing internal and external travel cases interchangeably); Zschernig v. Miller, 398 U.S. 429, 441 (1968)(citing internal and external cases interchangeably); Aptheker v. Secretary of State, supra, 378 U.S. at 519-520 (Justice Douglas concurring); Bell v. Maryland, 378 U.S. 226, 250 (1964)(discussing "the right to travel", citing both internal and external travel cases without distinction); Kent v. Dulles, supra, 357 U.S. at 126 ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." Kent relied on interstate travel cases to support the constitutional standards it erected for application in foreign travel cases); United States v. Davis, 482 F.2d 893, 912 (9th Cir. 1973)(the right to travel abroad is a "fundamental constitutional right of every American citizen." (Emphasis added.); United States v. Cyzewski, 484 F.2d 509, 511 n.2 (5th Cir. 1973), cert. denied, 415 U.S. 902 (1973); King v. New Rochelle Muni. Housing Auth., 442 F.2d 646, 648 (2nd Cir. 1971); Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970) aff'd 405 U.S. 438 (1972); Wilson v. United States, 366 F.2d 666, 668 n.2 (D.C. Cir. 1966)(Bazelon, C.J., concurring); Schactman v. Dulles, 225 F.2d 938, 944 (D.C. Cir. 1955)("Freedom to leave a country or a hemisphere is as much a part of liberty as freedom to leave a State."); Bauer v. Acheson, 106 F.Supp. 445, 451 (D. D.C. 1952)("[I]t is difficult to see where freedom to travel outside the United States is any less an attribute of personal liberty [than freedom to interstate travel].")

"freedom of travel is a constitutional liberty closely related to the rights of free speech and association..." Aptheker v. Secretary of State, supra, 378 U.S. at 517 (Emphasis added.) The tests of Kent and Aptheker were applied in Zemel despite the fact that the restrictions there were not applied "because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens." (381 U.S. at 13.) Incidental impositions on First Amendment rights, arising because of foreign travel restrictions, were considered and led this Court to hold that "the right to travel [abroad] is protected by the Fifth Amendment." (381 U.S. at 16, n.17.) See Aptheker v. Secretary of State, supra, 378 U.S. at 519-520 (Douglas, J., concurring.)

The standards established in Kent, Aptheker and Zemel, were correctly applied by the district court to measure the constitutionality of Section 1382(f). (440 F.Supp. at 795-800.) The due process and equal protection challenge raised by appellees could not be answered by application of the passive "rational basis" test.

C. The District Court Correctly Held That Section 1382(f) Does Not Bear A Fair And Substantial Relationship To Its Avowed Purpose And Therefore Violates the Fifth Amendment. 9/

The Secretary claims that since the enforcement of Section 1382(f) "does not directly inhibit or regulate" the right to international travel, the only issue is the allocation of non-contractual, social welfare benefits. (Jur. St. at 10.) Appellee Aznavorian lost two months of benefits, which provide her with the basic necessities of life, because she traveled outside the United States for a few days in excess of one calendar month. (440 F.Supp. at 791) In Memorial Hospital v. Maricopa County, supra, 415 U.S. at 259, this Court stated: "In Shapiro, the Court found denial of the basic 'necessities of life' to be a penalty."

In Dunn v. Blumstein, 405 U.S. 330, 339-340 (1972), it was again pointed out that:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In Shapiro, we explicitly stated that the compelling state interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel].' (Emphasis in original; footnote omitted.)

As the passport restriction in Aptheker imposed a "severe restriction" on travel abroad (375 U.S. at 507), so Section 1382(f) imposes a severe restriction on foreign travel in excess of 30 days because it triggers a termination of funds otherwise used by the blind, the disabled and the elderly, to survive. It also unreasonably deters foreign travel on the part of SSI recipients. Intervenors Anna Tolstick, 79-years old, and Betsabe Rivas, 81-years old, SSI recipients and residents of New York City, wished to visit relatives and their homelands of Russia and Columbia once more before they die. (Complaint for Intervention for Declaratory and Injunctive Relief and Relief in the Nature of Mandamus at 4.) They communicated in writing with the Secretary concerning their need for continued receipt of SSI benefits while traveling abroad for two months. (440 F.Supp. at 795.) They received written responses indicating that if they took their planned trips their

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9/ In the district court plaintiff Aznavorian argued that the right to travel abroad was a "fundamental right" triggering "strict scrutiny" analysis. (Plaintiff's Supplemental Memorandum Supporting Motions for Intervention and Application for Convening Three-Judge Court, and Opposing Defendant's Motion to Dismiss and for Summary Judgment at 2-10.) The district court instead found that while the "right to travel abroad is certainly a very important right...it should not be placed on an equal footing with the right to travel interstate." (440 F.Supp. at 796.) However, the district court also found that "infringement of this travel right is deserving of much closer scrutiny than that given under the 'rational basis' test." (440 F.Supp. at 797.) Appellee continues in the belief that the right is fundamental. Seeking only to affirm the result reached by the district court, and not its reasoning, appellee finds it unnecessary to brief why Section 1382(f) fails under a strict scrutiny analysis. She only seeks herein to establish that Section 1382(f) bears neither a substantial nor rational relationship t o its intended purpose.

SSI benefits would be suspended or terminated due to application of Section 1382(f). (440 F.Supp. at 795.) While the district court held that it lacked subject matter jurisdiction over their complaint, they were clearly deterred from traveling by the threatened loss of survival benefits.

As already noted above, appellee lost two months of vital benefits because of her brief trip outside the United States fortuitously extended a few days over the one-month limit by illness. (440 F.Supp. at 791) She would not agree with the Secretary that Section 1382(f) only affected her "remotely."

The Secretary argues that the district court should have measured Section 1382(f) against the "rational basis" test, "traditionally employed...in assessing whether social welfare classifications satisfy the requirements of due process and equal protection." (Jur. St. at 7-9.) The cases relied upon by the Secretary "are not controlling because Section 1382(f) implicates constitutionally protected conduct" and must, therefore, be measured against a test "more exacting than the 'rational basis' standard urged by defendant." (440 F.Supp. at 796.) While Califano v. Jobst, ___ U.S. ___, 98 S.Ct. 95 (1977) upheld termination of child's benefits upon marriage (Jur. St. at 7), this Court clearly stated that "[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." (98 S.Ct. at 99.) It can hardly be said that in today's world, the mere "fact" of travel for more than 30 days "characteristically signifies" abandonment of the traveler's residence in the United States. Jobst further recognized that broad legislative classifications must be judged "by reference to characteristics typical of the affected classes" rather than by focusing on "selected, atypical examples." (98 S.Ct. at 100.) Again, given modern travel facilities it would be irrational to conclude

that a "typical" person traveling abroad for more than 30 days has, in fact, abandoned his home in the United States. Marriage has historically acted as a determinative factor in creating presumptions concerning dependency in social welfare programs. Califano v. Jobst, supra, 98 S.Ct. at 99; Mathews v. de Castro, 429 U.S. 181 (1976); Weinberger v. Salfi, 422 U.S. 749, 778-784 (1975). By contrast, "tradition" and "common experience" do not support the conclusion that exercising the right to travel for brief periods of time "normally marks" the abandonment of residency. In fact, the Secretary "concedes that he maintains no statistics to substantiate that the one month or 30 day travel period is substantially related in fact to abandonment or establishment of residency." (440 F.Supp. at 798.) 10/

This Court, in Reed v. Reed, 404 U.S. 71, 76 (1971), determined that a gender-based distinction violated the Fifth Amendment unless it reflected a fair and substantial relationship in fact to the governmental purposes sought to be achieved by the distinction. See also Califano v. Goldfarb, 97 S.Ct. 1021, 1026-1027 (1977); Craig v. Boren, 97 S.Ct. 451, 457 (1976). As recognized by the Secretary, the Court in these cases did not apply the strict scrutiny standard invoked by "fundamental" rights, nor did it apply a "rational basis" test. (Jur. St. at 8-9.) Gender-based distinctions are forbidden when supported by "no more substantial justification than 'archaic and overbroad' generalizations ... [that do not coincide with] contemporary reality." Califano v. Goldfarb, supra, 97 S.Ct. at 1026-1027. These cases indicate that when an important right is at stake, this Court will invoke a constitutional test more stringent than the

10/ More recently, this Court has termed the right to marriage as "fundamental" (Zablocki v. Redhail, ___ U.S ___, 46 U.S.L.W.4093, 4097, decided January 18, 1978), and required a "critical examination" of the governmental interests advanced in support of the restriction on marriage. (46 U.S.L.W. at 4096.)

"rational basis" standard.

The district court, recognizing the constitutional standards already established by this Court in Kent, Aptheker and Zemel, cautiously applied the equal protection analysis of Reed to measure the Fifth Amendment limitations of Section 1382(f). The Reed analysis was applied to Section 1382(f) in conjunction with the rules enunciated in Kent, Aptheker and Zemel. (440 F.Supp. at 795-800.)

The Secretary argues that Section 1382(f) creates an "easily administrable demarcation" between residents and non-residents of the United States, implementation of which "is rationally related" to the purpose of paying SSI benefits only to United States residents. (Jr. St. at 10.) 11/ But in fact, Section 1382(f) establishes a "loss of residency" standard. As the district court noted, it creates "a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." 12/ (440 F.Supp. at 795.) The challenged statute further precludes an applicant or recipient from establishing or re-establishing residency until he has returned to the United States and waited for 30 consecutive days.

Administrative convenience alone is not a substantial enough reason to justify penalizing the basic constitutional right to international travel. See Memorial Hospital v. Maricopa Co., supra, 415 U.S. at 267 (rejecting the government's position that the residency period was a "convenient rule of thumb to determine bona fide residence "); Shapiro v. Thompson, supra,

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11/ Appellant concedes that Section 1382(f) "does not provide a perfect method of preventing non-residents from receiving SSI benefits. Nor does it necessarily comprise the best method available for accomplishing that objective." (Jur. St. at 11.)

12/ Appellees also challenged Section 1382(f) as violating due process guarantees because of its presumptive nature. But the district court held it unnecessary to rule on that issue. (440 F.Supp. at 799 n.12.)

394 U.S. at 636; Reed v. Reed, supra, 404 U.S. at 76.

The Secretary justifies the need for the "administrable demarcation" on the sole ground that "[w]ithout a simple test ... the Social Security Administration would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence ..." (Jur. St. at 10.) An analysis of the basic eligibility statutes and the Secretary's regulations clearly establishes that he would not face any "formidable task" without the assistance of the conclusive presumption in Section 1382(f). To determine United States residency, he in fact employs alternative methods. Section 1382c(a)(1)(B) clearly sets forth as one criterion for eligibility that the applicant must be "a resident of the United States ..." The initial SSI application form contains various questions aimed at establishing this residency. 13/ Section A5010 of the Social Security Claims Manual indicates that the recipient must report any change of mailing address or residence. Section A2101 provides the following language on residence:

> For purposes of title XVI, a person becomes a resident when he arrives in one of the fifty (50) states or the District of Columbia with the intent to establish his home there. When his arrival is of recent date and he has not established a permanent home, the intent to establish a home may be inferred from such actions as arranging for rental or purchase of a dwelling, obtaining or seeking employment, joining a church or the like. (Emphasis added.)

The key to residence is clearly the existance of a "home", or the "intent" to establish a "home". The "intent" may be "inferred" from other logical criteria.

As in Aptheker, "[t]he broad and enveloping prohibition [here required by Section 1382(f)] indiscriminately excludes

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13/ Claims Manual Section 12118, indicates that Item 4 of the application requires a statement as to the length of U.S. residency possessed by the applicant, and Item 8 requires the applicant to state how long he/she has been residing in the state. Item 13 requires the applicant to indicate whether he she owns or rents a home. The application form is signed under penalty of perjury.

plainly relevant considerations such as the individual's knowledge [appellee had no intention of abandoning residence], activity [recipient maintains a home, furniture, etc., in the United States] ... and purposes in and place for travel [appellee's trip was solely for health reasons]." (378 U.S. at 514) (Emphasis added.)

Finally, the Secretary argues that the provision of Section 1382(f) requiring individuals to be physically present in the United States after a trip abroad for at least 30 consecutive days in order to restore benefits "offers a simple means" by which a "continuing intention" to be a resident "may be evidenced." (Jur. St. at 11.) However, Section 1382(f) does little to assist in evidencing residency. On the contrary, as noted by the district court, "the dishonest applicant/recipient could just as easily swear to having fulfilled the requirement as not." (440 F.Supp. at 798.) See Memorial Hospital v. Maricopa Co. supra, 415 U.S. at 268. Moreover, the avowed purpose of Section 1382(f) could "be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period" thereby avoiding entirely application of the statute. (Id.) See 20 C.F.R. §416.325.

As in Aptheker, "less drastic means [are available to the Secretary] for achieving the same basic purpose" sought by Section 1382(f). (378 U.S. at 508.) Given the alternative methods already used by the Secretary to determine residency, it is clear that "less drastic means are available, and are employed," to ensure SSI payments only go to residents of the United States. Shapiro v. Thompson, supra, 394 U.S. at 637.

The district court correctly applied the equal protection and due process standards enunciated in Kent, Aptheker, Zemel and Reed to invalidate Section 1382(f) for infringing on the right to international travel. Thus, the Secretary's first question presented does not deserve plenary review.

II

THIS SUIT WAS PROPERLY
CERTIFIED AS A CLASS ACTION
UNDER 42 U.S.C. § 405(g)

The Secretary argues under his second "Question Presented" that (1) Section 405(g) precludes all class actions; and (2) the district court improperly granted injunctive relief to class members. These assertions do not merit plenary review.

1. Section 405(g) permits class actions as the Courts of Appeals have uniformly recognized. See, e.g., Liberty Alliance v. Califano, Nos. 77-1010/11 (3rd Cir. December 6, 1977); Elliott v. Weinberger, 564 F.2d 1219, 1229-1230 (9th Cir. 1977); De Lao v. Califano, 560 F.2d 1384, 1387 (9th Cir. 1977); Wilson v. Edelman, 542 F.2d 1260, 1275 (7th Cir. 1976); Tatum v. Mathews, 541 F.2d 161, 163-164 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111, 1125-1126 (8th Cir. 1976); Jimenez v. Weinberger, 523 F.2d 689, 694-696 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These decisions reason that Section 405(g) does not expressly bar class actions and that if the requirements of Federal Rule of Civil Procedure 23 are met, such class actions save judicial and administrative resources by avoiding the piecemeal resolution of individual Section 405(g) claims. Elliott v. Weinberger, supra, 564 F.2d at 1229-1230; Liberty Alliance v. Califano, supra, (Slip Opinion at 16).

The Secretary ignores the foregoing authorities while relying instead on Weinberger v. Salfi, 422 U.S. 749 (1975), and Jablon v. Secretary of Health, Education and Welfare, 399 F.Supp. 118, 124 (D. Md. 1975), sum. aff'd sub nom, Jablon v. Califano, 430 U.S. 924 (1977). Neither case holds that Section 405(g) bars all class actions.[14/] Salfi only disapproved a par-

14/ Indeed, no decision of this Court makes this holding. See Norton v. Mathews, 427 U.S. 524, 530 n.7 (1976); Mathews v. Diaz, 426 U.S. 67, 72 n.3 (1976).

ticular certified class because of its deficient definition (422 U.S. at 764), which the district court noted. (440 F.Supp. 792.) As Justice Stevens explained in Jimenez v. Weinberger, supra, 523 F.2d at 694-695:

> [I]f the Court did not believe a class action could ever be maintained under the Social Security Act, there would have been no need to analyze the shortcomings of the particular class which Salfi represented.

In Jablon, the plaintiffs withdrew their class motion, making the district court's class discussion unalloyed dicta. This Court's summary affirmance of the Jablon district court opinion "'affirm[ed] the judgment but not necessarily the reasoning by which it was reached.'" Mandel v. Bradley, 97 S.Ct. 2238, 2240 (1977).

The Secretary next claims that the Section 405(g) language providing for judicial review of a "final decision of the Secretary made after a hearing to which [the plaintiff] was a party..." "reveals a congressional design to bar class suits and to permit adjudication of individual claims only." (Jur. St. at 12.) He cites no legislative history to support any such "design". Indeed, Section 405(g), added to the Act in 1939, was not intended to bar class actions, but to establish the means by which Social Security claimants would gain access to the courts. There is absolutely no indication on the face of the statute or in the legislative history of the 1939 Amendments that Congress intended to bar class actions under the Act. The section was not added as a restriction of a previously broader grant of judicial review: it was added simply in order to make clear that there was judicial review of the Secretary's decisions, and that available remedies and scope of review were to be "similar to those made for the review of decisions of many administrative bodies." Senate Report, No. 734, 76th Cong., 1st Sess. 52 (1939). Congress simply wanted to conclusively establish a remedy, so that claimants would be assured access to the courts.

The Secretary argues that preclusion of class actions is also warranted because Social Security claims "inevitably turn upon particular facts" requiring case-by-case adjudication. (Jur. St. at 13 citing Norton Brief at 12-13.) But, as Justices Stevens, Brennan and Marshall stated in Norton v. Mathews, supra, 427 U.S. at 535-536:

> [We] cannot see why the need for case-by-case adjudication is not fully satified by limiting the plaintiff class to those who have satisfied the prerequisites to an action under §205(g). By definition, such persons have been denied relief for failure to meet the statutory requirement under constitutional attack and upon an administrative record sufficiently complete to permit judicial review. Once such persons are identified from their administrative records, relief may be granted expeditiously (footnotes omitted). 15/

These observations apply to the class certified by the district court.

Appellee class members have the same constitutional claims against Section 1382(f) and had their SSI suspended on a common factual basis, namely their absence from the United States for more than one calendar month. (440 F.Supp. at 793.) Accordingly, the district court "expeditiously" ordered relief expressly provided by Section 405(g): reversals of appellees' suspensions and opportunities for new administrative residency determinations with appropriate individual recoveries of SSI benefits wrongfully denied. (440 F.Supp. at 805-806.) This relief avoids any need for the district court to determine the individual facts of each class member's claim and accommodates the Secretary's interest in case-by-case adjudication. The Secretary, thus, has adduced no support for the absolute preclusion of class actions under Section 405(g).

The Secretary cannot argue that certification was erroneous in this case since he conceded in the district court

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15/ The Norton majority did not reach the class issues presented here because it upheld the constitutionality of another statute. (427 U.S. at 530.)

that the instant class was properly defined. (Defendant's Brief in Opposition to Plaintiff's Motion for Class Action Certification at 1.) The court defined the class so that every member individually satisfied the judicial review requirements of Sections 405(g) and 1383(c)(3). (440 F.Supp. at 792-93.) As such, the certified class was identical in all material respects to those in Jimenez v. Weinberger, supra, 523 F.2d at 695-696, and Oliver v. Califano, CCH Unemployment Ins. Rep. ¶15,244 at 2499-120 (C.D. Cal. 1977). For more detailed discussion, see Appellants' Jurisdictional Statement in Aznavorian v. Califano, No. 77-5999 at 4-5, 7-8, 10-11.

2. The Secretary also asserts that "...Section 405(g) does not empower the district court to grant injunctive relief beyond the particular applicants before the court." (Jur. St. at 12-13.) He does not contend that the relief granted Mrs. Aznavorian, however characterized, [16] was precluded by Section 405(g), only the relief granted to the class. If the relief granted Mrs. Aznavorian was proper, the same relief to the individual class members was also, and the Secretary's "class relief" argument is just his "absolute preclusion" argument (See, supra, at 17) in disguise.

The district court declared Section 1382(f) unconstitutional, reversed the Secretary's suspensions of SSI to Mrs. Aznavorian and appellee class members, and ordered him to repay SSI to Mrs. Aznavorian, and to provide the class members with an opportunity for proper administrative determinations of their United States residency. (440 F.Supp. at 803, 805.) This Court has approved such relief to individuals under Section 405(g). It has held that district courts may issue judgments under Section 405(g) and (h) declaring sections of the Social Security Act unconstitutional. Weinberger v. Salfi, supra, 422 U.S. at 762; Fleming v. Nestor, 363 U.S. 603, 607 (1960). It has also

16/ The Secretary has characterized the district court's order as "...enjoining...[him]...from enforcing..." Section 1382(f). (Jur. St. at 6.) Not one word in that opinion "enjoins" him from suspending SSI pursuant to that section. Regardless of the accuracy of his description, he does not argue that the court's relief to Mrs. Aznavorian exceeded its power under Section 405(g). (footnote 16 cont.)

approved Section 405(g) orders reversing unconstitutional benefit denials and either requiring automatic payment of benefits (Goldfarb v. Secretary of Health, Education and Welfare, 396 F.Supp. 308, 309 (E.D. N.Y. 1975), aff'd Califano v. Goldfarb, 430 U.S. 199 (1977)), or opportunities for administrative determinations pursuant to constitutional standards. E.g., Jimenez v. Weinberger, 417 U.S. 628, 637-638 (1974). The only limitation on such relief is that it cannot "reach beyond the particular [recipients] before the Court." Weinberger v. Salfi, supra, 422 U.S. at 763. Since all the appellee class members are before the court in a properly maintained class action, the class relief granted by the district court is clearly authorized. See Johnson v. Mathews, supra, 539 F.2d at 1126; Jimenez v. Weinberger, supra, 422 F.2d at 694.

III

SOVEREIGN IMMUNITY DOES NOT BAR RECOVERY OF UNCONSTITUTIONALLY DENIED SSI BENEFITS

Answering the third "Question Presented", the Secretary effectively asserts that sovereign immunity permits him to run roughshod over the constitutional rights of the poorest of our citizens with impunity. He says they may not recover vitally necessary SSI unconstitutionally denied to them. He cannot be successful on this point because to do so he would have to erase decades of judicial decisions awarding Social Security benefits illegally denied. See, e.g., Ayers v. Hobby, 123 F.Supp. 115, 118 (D. Va. 1954). The Secretary does not, indeed cannot, cite any social security decisions holding that sovereign immunity precludes courts from granting recipients and applicants the benefits denied solely pursuant to an unconstitutional statute,

16/ Cont'd.: Nor does he suggest or argue that it issued an "injunction" that could only be entered by a three-judge court. (See 2, n.3, supra.) And he does not argue that the order enjoins his prospective enforcement of Section 1382(f). This Court has not ruled whether such an order is permitted by Section 405(g). (See Norton v. Mathews, supra, 427 U.S. at 530 n.7), although two Courts of Appeals have authorized such relief. In re Letourneau, 559 F.2d 892, 893 (2d Cir. 1977); Jimenez v. Weinberger, supra, 523 F.2d at 694.

either by automatic payment of such benefits or by the opportunity to recover them after administrative remands. Numerous decisions approve such relief. E.g., Jimenez v. Weinberger, supra, 417 U.S. at 637-638; Goldfarb v. Califano, supra, aff'g. 396 F.Supp. at 309; Weinberger v. Weisenfeld, 420 U.S. 636 (1975), aff'g. 367 F.Supp. 981, 989 (D. N.J. 1973); Griffin v. Richardson, 409 U.S. 1069 (1972), aff'g. 346 F.Supp. 1126, 1237 (D. Md.).

Contrary to his Jurisdictional Statement at 13, the Secretary has repeatedly interpreted Sections 405(g) and (h) in this Court as a limited waiver of sovereign immunity. (See, e.g., Brief for Appellants in Weinberger v. Salfi at 17.) In fact, he has done so throughout this case, both in the district court (Defendant's Supp. Brief Opposing Three-Judge Court at 5), and here (Norton Brief at 21):

> Under [the scheme provided by Sections 405(g) and (h)], every claimant properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of any injunction restraining operation of the statute. If the claimants' contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards).

This consistent interpretation of Sections 405(g) and (h) by the agency charged with its administration is entitled to great weight. See, e.g., Fribourg Navigation Co. v. C.I.R., 383 U.S. 272, 281 (1966); Blew v. Richardson, 484 F.2d 889, 892 (7th Cir. 1973). Indeed, courts have relied on it by specifically holding Section 405 a limited waiver of sovereign immunity, permitting the relief granted here. E.g., Jimenez v. Weinberger, supra, 523 F.2d at 702, 704 n.33; Gaither v. Gardner, 295 F.Supp. 458, 459 (D. Md. 1969); Cohn v. Federal Security Administrator, 199 F. Supp. 884, 885 (W.D. N.Y. 1961).

The Secretary's citations to De Lao, Tatum and Johnson (Jur. St. at 13) do not support his assertion that sovereign

immunity has not been waived in Social Security cases. Even if Section 405(g) "only creates a basis for federal jurisdiction" (Jur. St. at 13), "two other federal statutes...confer a substantive right to recover" unconstitutionally denied SSI. Cf. United States v. Testan, 424 U.S. 392, 398 (1976). In Salfi, this Court (422 U.S. at 762) interpreted Section 405(h) as authorizing an action, like this one, "'to recover on any [Social Security] claim' [because] of allegedly unconstitutional statutory restrictions." (Emphasis added.) The second statute authorizing recovery of unconstitutionally denied SSI is 42 U.S.C. §1383(b):

> Whenever the Secretary finds that...less than the correct amount of benefits has been paid with respect to an individual, proper ...recovery shall...be made by appropriate adjustments in future payments to such individual...(Emphasis added.) 17/

The district court correctly noted that Section 1383(b) authorizes recovery of underpayments for "any mistaken denial," constitutional or otherwise. (440 F.Supp. at 802.)

De Lao, Tatum and Johnson approve this interpretation of Section 1383(b) as constituting a limited waiver of sovereign immunity. As stated in De Lao v. Califano, supra, 560 F.2d at 1391:

> ...Congress has authorized retroactive payments to those who are found eligible after a hearing. It is only those found not eligible who will not get retroactive payments. Retroactive relief for them is barred by sovereign immunity.

See also Tatum v. Mathews, supra, 541 F.2d at 166 n.5; Johnson v. Mathews, supra, 539 F.2d at 1125. 18/

17/ The Secretary's regulations also provide for the opportunity to recover underpayments. 20 C.F.R. §§416.535 - .543. Appellants' Jurisdictional Statement in Aznavorian v. Califano, No. 77-5999 at 8-9 discusses these regulations.

18/ This is obviously not a suit for money damages, as the Secretary contends. Nor is it a suit to recover retroactive benefits for potentially ineligible persons as in De Lao, Tatum and Johnson. In those cases, persons who had not yet been determined eligible for benefits sought retroactive payments for the period between their terminations and reaffirmations of ineligi-

(footnote 18 continued)

Appellee class members requested, and the district court granted, only the type of relief recognized in De Lao, Tatum, and Johnson: an opportunity to prove they did not in fact abandone their residences during their brief trips outside the country. Only those who did not abandon their residences will be entitled to recover the SSI unconstitutionally denied. (440 F.Supp. at 801, 803.) Thus, the Secretary has produced no authority to show that Sections 405(g) and (h) and 1383(b) and (c) do not constitute a limited waiver of sovereign immunity authorizing this relief. 19/

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18/ Cont'd.: bility by the Secretary after a hearing. Those ineligible plaintiffs contended due process entitled them to benefits pending a hearing which redetermined ineligibity. The due process clause is not a waiver of sovereign immunity.

19/ Edelman v. Jordan, 415 U.S. 651 (1974) is not relevant. (Jur. St. at 14.) There, this Court held, inter alia, that a state's participation in the federal-state Aid to the Aged, Blind and Disabled Program ("AABD"), which on January 1, 1974 became the federal SSI program involved here (415 at 653 n.2), did not constitute a waiver of its Eleventh Amendment immunity from a federal court suit for retroactive welfare benefits. (415 U.S. at 671-72.) The basis for its ruling was that under the federal statutes authorizing the AABD program, a "...congressional authorization to sue a class of defendants which literally includes States is wholly absent." (415 U.S. at 672.) Congress has specifically authorized suits in federal court against the Secretary to review and recover erroneously denied SSI benefits 42 U.S.C. §§405(g) and (h), 1383(b) and (c). The Edelman decision was limited to the narrow waiver of Eleventh Amendment immunity, and not the broader question of the waiver of sovereign immunity. Rhodes v. Weinberger, 388 F.Supp. 7 442 (E.D. Pa. 1975).

CONCLUSION

For the foregoing reasons, this Court should summarily affirm that portion of the district court's judgment from which the Secretary appeals.

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